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6 MENU FOODS HOLDING, INC.

FILED ORIGINAL

07 APR 18 AM 11:00

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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DEPUTY

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DIANE SWARBERG, individually and on
11 behalf of all others similarly situated;

12 Plaintiffs,

13 v.

14 MENU FOODS HOLDING, INC.,
15 THE IAMS COMPANY, and
16 DOES 1 through 100, inclusive,

17 Defendants.

'07 CV 0706BTM POR
CASE NO.

**NOTICE OF REMOVAL OF ACTION;
DEMAND FOR JURY TRIAL**

[28 U.S.C. § 1441(a)]

18 **TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

19 **PLEASE TAKE NOTICE** that defendant, MENU FOODS HOLDING, INC. (hereinafter
20 referred to as "MENU FOODS" or "Defendant"), pursuant to 28 U.S.C. sections 1441 and 1446,
21 files this Notice of Removal (hereinafter "Notice") of this action from the Superior Court of the
22 State of California for the County of San Diego to the United States District Court for the
23 Southern District of California. The grounds for removal are as follows:
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1 **I. INTRODUCTION**

2 1. DIANE SWARBERG, on behalf of herself, similarly situated consumers, and the
 3 general public (hereinafter referred to as "Plaintiff"), commenced this products liability action in
 4 the Superior Court of the State of California, County of San Diego, entitled DIANE SWARBERG
 5 v. MENU FOODS HOLDING, INC., THE IAMS COMPANY, and DOES 1 THROUGH 100,
 6 Case No. 37-2007-00064066-CU-MY-CTI, on March 26, 2007. Plaintiff alleges that her pet
 7 became ill upon consuming pet food manufactured and distributed by Defendant. Plaintiff further
 8 claims that she sustained compensatory damages, including veterinarian bills and related
 9 expenses, as a result of her pet's illness. A true and correct copy of the Complaint is attached
 10 hereto and incorporated by reference as **Exhibit A**.

11 2. MENU FOODS has yet to be served with a copy of the Summons and the
 12 Complaint; however, it makes this Notice having received notice of this action. Pursuant to
 13 28 U.S.C. section 1441, this Notice of Removal is timely filed.

14 3. As more fully set forth below, this is a civil action over which this Court has
 15 original jurisdiction under 28 U.S.C. section 1332(d)(2), and this action is removable under
 16 28 U.S.C. section 1441, because it is a civil action in which the matter in controversy exceeds the
 17 sum or value of \$5,000,000, exclusive of interest and costs, and is a class action between citizens
 18 of different states. Therefore, pursuant to 28 U.S.C. section 1441(a), the Defendant may remove
 19 this action to this Court.

20 **II. THIS COURT HAS SUBJECT MATTER JURISDICTION**

21 **A. The Amount in Controversy Requirement Exceeds \$5,000,000**

22 4. It is apparent from the fact of the Complaint that the Plaintiff seeks recovery of an
 23 amount in excess of \$5,000,000, exclusive of costs and interest. Plaintiff filed this class action on
 24 behalf of herself as an individual and similarly situated individuals of the United States whose
 25 pets became ill and/or died after consuming various brands of allegedly tainted pet food for dogs
 26 and cats manufactured by Defendant and distributed and sold through the State of California and
 27 the country. Plaintiff alleges that she has sustained compensatory damages in the form of
 28 veterinarian bills and related expenses, as a result of her pet's illness. In addition, Plaintiff alleges

1 that countless pets have died, and thousands of pets throughout the State of California have
 2 suffered serious adverse health consequences, and have required extensive medical care, as a
 3 result of consuming the affected pet food. Plaintiff acknowledges that the members of the
 4 putative class are numerous, and although the entire class is unknown to Plaintiff at this time, it is
 5 estimated that the entire class is "at least in the hundreds, if not thousands considering the fact
 6 that Menu Foods Holding, Inc. has identified 53 dog foods and 42 cat foods which may be
 7 causing harm to pets . . ." Plaintiff's prayer for relief seeks special damages, including veterinary
 8 expenses and loss of earnings; disgorgement of all profits, punitive damages; and attorney fees,
 9 on behalf of herself and all the members of the class. Further, nowhere in the Complaint does the
 10 Plaintiff limit the amount in controversy to less than \$5,000,000. See **Exhibit A**.

11 5. "Where the class action complaint does not specify the amount of damages sought,
 12 the removing defendant must prove by a preponderance of the evidence that the amount in
 13 controversy requirement has been met." Davis v. Chase Bank U.S.A., 453 F.Supp.2d 1205, 1208
 14 (C.D. Cal. 2006). Under this standard, "the defendant must provide evidence that is 'more likely
 15 than not' that the amount in controversy satisfies the federal diversity jurisdictional amount
 16 requirement." Davis, 453 F.Supp.2d at 1208; citing Abrego v. The Down Chemical Co., 443 F.3d
 17 676, 683 (9th Cir. 2006).

18 6. Based on Plaintiff's own allegations that MENU FOODS has issued a recall of 53
 19 brands of "cuts and gravy wet-style dog food" and 42 brands of "cuts and gravy wet style cat
 20 food," and the types of damages claimed in the Complaint, it is apparent that the amount in
 21 controversy exceeds \$5,000,000, exclusive of costs and interest.

22 7. Moreover, there are numerous pending class actions against MENU FOODS in
 23 various federal judicial districts in which the named plaintiffs allege that jurisdiction exists under
 24 28 U.S.C. section 1332(d)(2). There is no reason to believe that the damages or amount in
 25 controversy, exclusive of costs and interest, claimed by the Plaintiff in this civil action will be
 26 less than those alleged in the pending federal cases.

27 8. The Defendant has, therefore, met its burden of showing a reasonable probability
 28 that the amount in controversy satisfies the federal jurisdictional amount.

1 **B. Complete Diversity of Citizenship Exists**

2 9. There is complete diversity of citizenship between the Plaintiff and the Defendants
 3 in this action. Diversity in a class action is established when "any member of a class of plaintiffs
 4 is a citizen of a State different from any defendant." 28 U.S.C. section 1332(d)(2)(A).

5 10. According to the Complaint, the named Plaintiff is a citizen of the State of
 6 California.

7 11. MENU FOODS is a Delaware corporation with its principal place of business in
 8 Streetsville, Ontario, Canada. Pursuant to 28 U.S.C. section 1332(c)(1), "a corporation shall be
 9 deemed to be a citizen of any State by which it has been incorporated and of the State where it
 10 has its principal place of business." 28 U.S.C. section 1332(c)(1). MENU FOODS is deemed to
 11 be a citizen of the state listed above, which is not the State of California.

12 12. The other named defendant, THE IAMS COMPANY, is, on information and
 13 belief, an Ohio company. THE IAMS COMPANY has not appeared in the action. The "DOE"
 14 defendants are wholly fictitious and sham parties against whom no relief is, or could be, sought in
 15 this action. Pursuant to 28 U.S.C. section 1441(a), this Court should disregard the citizenship of
 16 any defendant sued under this fictitious name. Accordingly, it is not necessary that any parties
 17 join in this Notice of Removal of Action:

18 13. This case should be removed to the United States District Court for the Southern
 19 District of California pursuant to 28 U.S.C. sections 1332 and 1441, because: (1) the Plaintiff is a
 20 citizen of the State of California; (2) MENU FOODS is not a citizen of the State of California;
 21 and (3) the amount in controversy exceeds \$5,000,000, exclusive of costs and interest.

22 **III. PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED**

23 14. This Notice of Removal is timely according to 28 U.S.C. section 1446(b).

24 15. The Defendant, in good faith, believes that the amount in controversy exceeds
 25 \$5,000,000, exclusive of costs and interest, and complete diversity of citizenship exists.

26 16. The United States District Court of the Southern District of California embraces
 27 the county in which the state court action is now pending. Therefore, this action is properly
 28 removed to the Southern District of California pursuant to 28 U.S.C. section 93(a)(1).

1 17. Pursuant to 28 U.S.C. section 1446(d), the Defendant is filing written notice of this
2 removal to all adverse parties and will file a copy of the notice with the clerk of the State court in
3 which this action is currently pending.

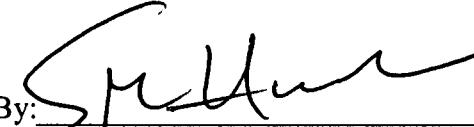
4 **WHEREFORE**, MENU FOODS respectfully moves this action from the Superior Court
5 of the State of California for the County of San Diego to the United States District Court for the
6 Southern District of California pursuant to 28 U.S.C. sections 1332, 1441, and 1446.

7 **DEMAND FOR JURY TRIAL**

8
9 Pursuant to Federal Rule of Civil Procedure 38, MENU FOODS hereby demands trial by
10 jury in this action.

11
12 DATED: 18 APR 07

13 HIGGS, FLETCHER & MACK LLP

14 By: 

15 SUSAN M. HACK, ESQ.
16 Attorneys for Defendant MENU FOODS
17 HOLDING, INC.

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CENTRAL DIVISION

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07 MAR 26 2007 4:25

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

5
 6 Attorneys for Plaintiff
 Diane Swarberg.

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF SAN DIEGO

9
 10 DIANE SWARBERG, individually and on
 behalf of all others similarly situated

No. 37-2007-00064066-CU-MT-CTL

11 Plaintiff,
 12 vs.
 13
 14 MENU FOODS HOLDING, INC., THE
 IAMS COMPANY, and DOES 1 through 100,
 15 inclusive

CLASS ACTION COMPLAINT
 FOR BREACH OF WARRANTY;
 VIOLATION OF THE CONSUMER
 LEGAL REMEDIES ACT CIVIL CODE §
 1750 ET SEQ.; NEGLIGENT
 MISREPRESENTATION; STRICT
 PRODUCTS LIABILITY; AND
 NEGLIGENCE

16 Defendants

17 _____
 18 BY FAX

19 Plaintiff Diane Swarberg ("Plaintiff" or "Ms. Swarberg") brings this civil action for
 20 damages on behalf of herself and all other similarly situated against the above-named Defendants
 21 and complains and alleges as follows:

22 J. NATURE OF ACTION

23 1. Ms. Swarberg brings this action as a Class Action pursuant to Rule 382 of the Code
 24 of Civil Procedure, on behalf of all persons residing in the State of California who purchased any
 25 dog or cat food which was produced by any of the above-named defendants and has had a dog or
 26 cat become ill or died as a result of eating the food, and/or which have had to incur veterinary bills
 27 purchase special kidney sensitive food, both present and in the future, as a result of such injuries.

28 2. The defendants are producers and distributors of, *inter alia*, dog and cat food.

1 Menu Foods Holdings, Inc. produces dog and cat food under familiar brand names such as Iams,
2 Eukanuba and Science Diet. Menu Foods Holdings, Inc. distributes its dog and cat food
3 throughout the United States to retailers such as Wal-Mart, Target, Petco, PetSmart, and Safeway.

4 3. Dog and cat food which the defendants produced has caused an unknown number
5 of dogs and cats to become ill, and caused several to die.

6 4. To date, Menu Foods Holdings, Inc. has recalled 53 brands of dog food and 42
7 brands of cat food which are causing dogs and cats to become ill. All recalled food to date is of
8 the "cuts and gravy wet" style. The recalled brands, including any to be added to the recall list
9 later, are collectively referred to herein as the "Product."

10 5. As a result of the Defendants' actions Ms. Swarberg and other Class members have
11 suffered and will suffer economic damage.

12 II. PARTIES

13 6. Plaintiff Diane Swarberg has at all material times been a resident of San Diego,
14 California.

15 7. Defendant Menu Foods Holdings, Inc. is, upon information and belief, a
16 corporation organized under the laws of Delaware which transacts business in each of the 50
17 United States, including the State of California and County of San Diego. Menu Foods Holdings,
18 Inc. and/or its subsidiaries, is engaged in the business of manufacturing, distributing, marketing
19 and selling pet foods.

20 8. Defendant, The Iams Company, is upon information and belief, an Ohio company
21 which transacts business in California and all 50 States, including the State of California and
22 County of San Diego. IAMS is engaged in the business of manufacturing, distributing, marketing
23 and selling pet foods.

24 9. Plaintiff is ignorant at this time of the true names and capacities of Defendants
25 identified in the caption of this Complaint as DOE 1 through DOE 25. Plaintiff is suing these
26 Defendants by such fictitious names pursuant to California Code of Civil Procedure section 474
27 and will amend this Complaint to show their true names and capacities when the same have been
28 ascertained. For the time being, Plaintiff is informed and believes that Defendants DOES 1

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1 though 25 were and are business entities, organizations, joint venturers, partnerships, associations,
2 public entities, public agencies, and/or individuals who participated in the design, engineering,
3 development, manufacture, marketing, and selling of the Product along with the other named
4 Defendants.

5 10. Plaintiff is further informed and believe that, at all times mentioned in this
6 Complaint, Defendants, including DOES 1 through 25, were the agent, servant, and/or employee
7 of the other, and each was acting within the course and scope of their agency and/or employment
8 with respect to the acts complained of in this Complaint.

9

10 **III. JURISDICTION AND VENUE**

11 11. This Court has jurisdiction over this action pursuant to California Code of
12 Procedure section 410.10. Plaintiff seeks damages and restitution on behalf of herself and all
13 others similarly situated in the United States, under common and statutory law of the State of
14 California.

15 12. Venue is proper in this Court because (a) the warranties which are the subject of
16 this action were made, or to be performed, and/or breached in this county; (b) the obligation or
17 liability which is the subject of this action arose in this county; (c) some of the described injuries
18 to property occurred in this county; (d) a substantial portion of the acts and transactions described
19 herein occurred within this county; (f) Defendants are registered to do business in the State of
20 California and/or are doing business within this county; and (g) because Defendants did do
21 business in this county by selling and marketing the items at issue in this county. Attached to this
22 Complaint as Exhibit "A" is a declaration from Plaintiff Swarberg attesting to facts establishing
23 proper venue in this county pursuant to Civil Code section 1780(c).

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2 IV. CLASS ACTION ALLEGATIONS

3 13. Plaintiff brings this lawsuit as a class action on behalf of herself and all other
4 persons similarly situated, pursuant to *Code of Civil Procedure* section 382, and to the extent
5 applicable, the analogous provisions of Federal Rule of Civil Procedure 23. And, as detailed
6 below, this class action satisfies the numerosity, ascertainability, typicality, adequacy,
7 predominance, and superiority requirements of those statutes. Plaintiff brings this suit on behalf
8 of herself and a Plaintiff Class (the "Class") composed of:

9 All persons residing in the State of California at the time that they purchased any
10 dog or cat food which was produced by the defendants which became the subject of the
11 recall of such food, and who have had a dog or cat which became ill resulting in death or
12 injury, and/or required veterinary examinations, and/or will require increased veterinary
13 examinations as a result of eating the food.

14 Plaintiff reserves the right to modify this class definition prior to moving for class
15 certification.

16 14. This action has been brought and may be properly maintained as a class action
17 pursuant to C.C. P. 382, Civil Code section 1781, and Rule 23 of the Federal Rules of Civil
18 Procedure for the following reasons:

19 a. The Class is ascertainable and there is a well-defined community of interest
20 among the members of the Class;

21 b. Membership in the Class is so numerous as to make it impractical to bring
22 all Class members before the Court. The identity and exact number of Class members is unknown
23 but is estimated to be at least in the hundreds, if not thousands considering the fact that Menu
24 Foods Holdings, Inc. has identified 53 dog foods and 42 cat foods which may be causing harm to
25 pets, and there are news reports of many ill or dying pets;

26 c. Plaintiff's claims are typical of those of other Class members, all of whom
27 have suffered harm due to Defendants' uniform course of conduct;

28 d. Plaintiff is a member of the Class;

1 c. There are numerous and substantial questions of law and fact common to all
2 of the members of the Class which control this litigation and predominate over any individual
3 issues. The common issues include, but are not limited to, the following:

4 i. Did the defendants make representations regarding the safety of the
5 dog and cat food they produced and sold?

6 ii. Were the defendants' representations regarding the safety of the dog
7 and cat food they produced and sold?

8 iii. Did the defendants' dog and cat food cause Plaintiff's and other
9 Class members' pets to become ill?

10 iv. Were Plaintiff and other Class members damaged?

11 f. These and other questions of law or fact which are common to the members
12 of the Class predominate over any questions affecting only individual members of the Class;

13 g. Plaintiff will fairly and adequately protect the interest of the Class in that
14 Plaintiff has no interests that are antagonistic to other members of the Class and has retained
15 counsel competent in the prosecution of class actions to represent herself and the Class;

16 h. Without a class action, the Class will continue to suffer damage,
17 Defendants' violations of the law or laws will continue without remedy, and Defendants will
18 continue to enjoy the fruits and proceeds of their unlawful misconduct;

19 i. Given (i) the substantive complexity of this litigation; (ii) the size of
20 individual Class members' claims; and (iii) the limited resources of the Class members, few, if
21 any, Class members could afford to seek legal redress individually for the wrongs Defendants
22 have committed against them;

23 j. This action will foster an orderly and expeditious administration of Class
24 claims, economies of time, effort and expense, and uniformity of decision;

25 k. Inferences and presumptions of materiality and reliance are available to
26 obtain class-wide determinations of those elements within the Class claims, as are accepted
27 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendants'
28 common liability, the Court can efficiently determine the claims of the individual Class members;

1 I. This action presents no difficulty that would impede the Court's
2 management of it as a class action, and a class action is the best (if not the only) available means
3 by which members of the Class can seek legal redress for the harm caused them by Defendants.

6 15. The Claims in this case are also properly certifiable under applicable law.

V. STATEMENT OF FACTS

16 Plaintiff Diane Swarberg was the owner of a male cat named Oscar.

10 17. Ms. Swarberg acquired Oscar in 1995.

11 18 Oscar ate one to three bags daily of IAMS Select Adult Bites, which is one of the
12 foods covered by Defendants' recall. He has been eating IAMS Select Adult Bites for many years.
13 He had been generally healthy up until March 2007.

14 19 In March 2007, Oscar became extremely ill and Ms. Swarberg took him to a
15 veterinarian who informed her that Oscar had suffered kidney failure, also known as acute renal
16 failure. A few days later, on March 15, 2007, tests showed that Oscar was suffering from
17 irreversible kidney failure, and the advice of the veterinarian was that the humane thing to do was
18 to euthanize Oscar, which was done with great reluctance. Blood and urine tests were done, and
19 an autopsy has confirmed that the kidney failure was consistent with poisoning. On information
20 and belief, at least six other cats in San Diego County have died due to poisoning by Defendants'
21 Product.

22 20. In March 2007, Menu Foods Holdings, Inc. recalled 53 brands of cuts and gravy
23 wet-style dog food and 42 brands of cuts and gravy wet style cat food which had caused dogs and
24 pets to become ill. One common symptom in the sick animals was kidney failure, also known as
25 acute renal failure. On information and belief, the recalled foods are contaminated with a
26 rodenticide which is a known poison harmful to cats and dogs.

27 21. On information and belief, the contaminated Product has caused the deaths or
28 sickness of hundreds of cats and dogs nationwide, requiring veterinary care, repeated monitoring

1 by veterinarians, special medication, and permanent injuries. Those class members who have had
2 their pets die, have lost the fair market and other peculiar value (Civil Code § 3355) of their pets.
3 The peculiar value of the pets to their owners, is deemed to be the value of that property because
4 Defendants had notice thereof and/or were willful wrongdoers pursuant to Civil Code section
5 3355. The class members have had to throw out substantial quantities of unused pet food due to
6 the recall. The owners of such injured pets, such as Ms. Swarberg, have also suffered severe
7 emotional distress at having their pets die and /or become hospitalized as a result of ingesting the
8 Product. Those emotional distress claims will be subject to individualized proof, post-disposition
9 of common class claims, as shall be further articulated in a trial plan.

10 **FIRST CAUSE OF ACTION**

11 **BREACH OF WARRANTY**

12 22. Plaintiff realleges all prior allegations as though fully stated herein.

13 23. Plaintiff and Class members purchased pet food produced by the defendants based
14 on the understanding that the food was safe for their pets to consume.

15 24. The pet food produced by the defendants was not safe for pets to consume and
16 caused dogs and cats to become ill. The unsafe nature of the pet food constituted a breach of the
17 implied warranty of merchantability.

18 25. Cat food and dog food produced by Menu Foods Holdings, Inc. are "goods" within
19 the meaning of Uniform Commercial Code Article 2.

20 26. Defendants' conduct as described herein constitutes breach of an implied or express
21 warranty of affirmation.

22 27. Defendants' conduct as described herein constitutes breach of an implied warranty
23 of merchantability.

24 28. Defendants' conduct as described herein constitutes breach of an implied warranty
25 of fitness for a particular purpose.

26 29. As a proximate result of the aforementioned wrongful conduct and breach, Ms.
27 Swarberg and other class members have suffered damages in an amount to be proven at trial.
28 Defendants had actual or constructive notice of such damages.

1 30. As a result of the breach, Plaintiff and Class members suffered damages which may
2 fairly and reasonably be considered as arising naturally from the breach or may reasonably be
3 supposed to have been in the contemplation of the parties, at the time they made warranties as to
4 the Product, and as the probable result of the breach of such warranties.

5

6 SECOND CAUSE OF ACTION

7

8 UNJUST ENRICHMENT

9 31. Plaintiff realleges all prior allegations as thought fully stated herein.

10 32. Defendants were and continue to be unjustly enriched at the expense of Ms. Swarberg and other Class members.

11 33. Defendants should be required to disgorge this unjust enrichment.

12 THIRD CAUSE OF ACTION

13 CONSUMER LEGAL REMEDIES ACT

14 (Civil Code section 1750, et. seq.)

15 34. Plaintiff realleges all prior allegations as thought fully stated herein.

16 35. Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair
17 business act within the meaning of the Consumer Legal Remedies Act, Civil Code section 1750.
18 et. seq.

19 36. Defendants are "persons" as defined under Civil Code section 1761(c).

20 37. Defendants violated Civil Code sections 1770(a)(5) and (7) when they failed to
21 disclose that Defendants' Product is inherently defective and dangerous and not fit for its intended
22 purpose. Defendants' sale of hazardous pet food has the capacity to deceive a substantial portion
23 of the public and to affect the public interest.

24 38. As a result of the above material omissions, Defendants have committed the
25 following violations of section 1770:

26 a) Defendants have represented that their pet food has characteristics or
27 benefits which it does not have (section 1770(a) (5));

28 b) Defendants have falsely represented that their pet food is of a particular
 standard, quality or grade (section 1770(a) (7)).

1 39. Defendants' deceptive practices, as alleged above, were specifically designed to,
2 and did, induce Plaintiffs and members of the Class to purchase the Product. Defendants
3 engaged in marketing efforts to reach the Class and persuade members to purchase the
4 defective Product, leading to the injuries to their pets as well as other damages.
5

6 40. As a result of Defendants' unfair or deceptive acts or practices, Ms. Swarberg and
7 other class members suffered injuries in an amount to be proven at trial.
8

9 41. Plaintiff and the Class are providing Defendants with the notice required by giving notice of their violation of the Consumers Legal Remedies Act by mail. Plaintiffs at this
10 time request only injunctive relief, until the expiration of the 30 day period in which Defendants
11 may respond to the notice. Such injunctive relief may include further notice of the recall to the
12 public, and an expansion of the recall, among other things. Plaintiff and the Class will amend
13 their Complaint to add claims for damages in the event that Defendants do not respond to the
14 Notice in the specified time. As such, Plaintiffs have therefore complied with the 30-day notice
15 period required by Civil Code section 1782(a).
16

FOURTH CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION

17 41. Plaintiff realleges all prior allegations as though fully stated herein.
18

19 42. Defendants owed Ms. Swarberg and the Class members as a duty to exercise
20 reasonable care in representing the safety of its dog and cat foods.
21

22 43. Defendants falsely represented that its dog and cat food was safe for consumption
23 by dogs and cats.
24

25 44. In reality, Defendants' dog and cat food caused dogs and cats to become ill and, in
26 some cases, to die.
27

28 45. Ms. Swarberg and class members reasonably relied on the information provided by
29 Defendants regarding the safety of its dog and cat food.
30

31 46. As a proximate cause of Defendants' false representations Ms. Swarberg and other
32 Class members suffered damages in an amount to be proven at trial.
33

FIFTH CAUSE OF ACTION**STRICT PRODUCTS LIABILITY**

47. Plaintiff realleges all prior allegations as though fully stated herein.

48. The Product in all its forms is defective in that it was manufactured or packaged such that it came to contain poisons that are harmful to animals which consume it. Defendants, and each of them, knew that the Product would be purchased and used without inspection for defects by the purchaser or user. The Product was further defective due to inadequate testing.

49. The kinds of harm which befall Plaintiff, her pet, and the members of the Class and their pets, including in the form of veterinary expenses and emotional distress, were entirely foreseeable results of the defect in the Product.

50. Neither Plaintiff nor any member of the Class knew or had reason to know at the time of his/her purchase, or at any time prior to the injuries to their pets, that the Product was defective.

51. Plaintiff requests damages including punitive damages, and medical and related expenses for their pets, against all Defendants.

SIXTH CAUSE OF ACTION**NEGLIGENCE**

52. Plaintiff realleges all prior allegations as though fully stated herein.

53. Because Defendants were in the business of manufacturing, canning, marketing, distributing and selling food for consumption by pets and possibly by members of the general public who might intentionally or unknowingly consume it, Defendants each owed a duty of care to the general public and to Plaintiff and the Class members in particular, to use reasonable care to see that the Product sold by them was fit for animal as well as human consumption.

54. Defendants, and each of them, failed to use reasonable care in the manufacture, processing, preparation, and sale of the Product as described above, and as a proximate result of their negligence and carelessness, poison in the form of rodenticide or other contaminants harmful to animals and humans was present in the Product purchased by the Class members and consumed

by their pets.

VII. PRAYER FOR RELIEF

3 WHEREFORE, Plaintiff and the Class members request that the Court enter an order of
4 judgment against Defendants including the following:

5 A. Certification of the action as a class action pursuant to C.C.P. Rule 382 and Civil
6 Code section 1783 with respect to the claims for damages, and appointment of Plaintiff as Class
7 Representative and her counsel of record as Class Counsel;

8 B. Actual damages (including all general, special, incidental, and consequential
9 damages), statutory damages (including treble damages), punitive damages (as allowed by the
10 law(s) of the states having a legally sufficient connection with defendants and their acts or
11 omissions) and such other relief as provided by the statutes cited herein;

C. Prejudgment and post-judgment interest on such monetary relief;

13 D. Equitable relief in the form of restitution and/or disgorgement of all unlawful or
14 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct
15 alleged herein;

16 E. Other appropriate injunctive relief including but not limited to additional notice of
17 the recall to the public;

18 F. The costs of bringing this suit, including reasonable attorneys' fees; and

19 G. Such other relief as this Court may deem just, equitable and proper.

21 Date: March 26, 2007

BERDING & WEIL LLP

Jeffrey B. Crcghin, Esq.
Steven R. Weinmann, Esq.
Attorneys for Plaintiff

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BERDING & WEIL

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CIVIL BUSINESS OFFICE 171
CENTRAL DIVISION

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CLERK'S SUPERIOR COURT
SAN DIEGO COUNTY, CA

5 Attorneys for Plaintiff
6 Diane Swarberg

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF SAN DIEGO

9
10 DIANE SWARBERG, individually and on
behalf of all others similarly situated,

No. 37-2007-00064066-CU-MT-CTL

11 Plaintiff,

12
13 vs.
14 **DECLARATION IN LIEU OF
AFFIDAVIT**

15 MENU FOODS HOLDING, INC., THE
IAMS COMPANY, and DOES 1 through 100,
inclusive,

(Code of Civil Procedure § 2015.5)

16 Defendants

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18 **DECLARATION OF PLAINTIFF DIANE
SWARBERG PURSUANT TO CIVIL
CODE SECTION 1780(c)**19
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28 **BY FAX**

I, DIANE SWARBERG, declare:

1. I am the named Plaintiff in the above-captioned lawsuit, and I submit this Declaration in support of Plaintiff's Complaint and in accordance with Civil Code section 1780(c) to state facts showing that this action has been commenced in a county described in Code of Civil Procedure section 1780 as a proper place for the trial of this action.

2. I am a citizen and resident of San Diego County, State of California, and, if called as a witness, I would testify of my own personal knowledge as follows:

3. In the period from 2005 to March 2007, I purchased cat food sold under the brand name "IAMS Select Adult Bites" for my cat, Oscar, at a store in San Diego County, California.

DECLARATION IN LIEU OF AFFIDAVIT

1 4. It is my understanding that the cat food I purchased was manufactured by Menu
 2 Foods, Inc. for IAMS, and that this particular item is part of a recall of contaminated pet food by
 3 Menu Foods, Inc.

4 5. My cat, Oscar, became ill after consuming the IAMS / Menu Foods food.

5 6. I brought him to a veterinarian, who told me that he was suffering from kidney
 6 failure.

7 7. Following further tests, it was decided that the most humane thing to do was to
 8 euthanize Oscar, who died on March 15, 2007.

9 8. An autopsy has been performed, and the tests show that Oscar had poison in his
 10 system. Recent press reports have stated that the Menu Foods products are contaminated with a
 11 type of rat poison.

12 9. All of the matters discussed herein occurred or substantially occurred in San
 13 Diego County, in the State of California.

14 I declare under penalty of perjury under the laws of the State of California that the
 15 foregoing is true and correct. Executed this 27 day of March, 2007, at San Diego,
 16 California.

17 Diane Swarberg
 18 Diane Swarberg
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1 SUSAN M. HACK, ESQ. (Bar No. 145347)
2 HIGGS, FLETCHER & MACK LLP
3 401 West "A" Street, Suite 2600
4 San Diego, CA 92101-7913
5 TEL: 619.236.1551
6 FAX: 619.696.1410

7
8 Attorneys for Defendant
9 MENU FOODS HOLDING, INC.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

'07 CV 0706BTM POR

CASE NO. _____

PROOF OF SERVICE BY MAIL

TRIAL DATE: No Date Set

DIANE SWARBERG, individually and on
behalf of all others similarly situated,

Plaintiffs,

v..

MENO FOODS HOLDING, INC., THE
JAMS COMPANY, and DOES 1 through
100, inclusive,

Defendants.

I, the undersigned, declare:

I am a resident of the State of California and over the age of eighteen years, and not a
party to the within action; my business address is 401 West "A" Street, Suite 2600, San Diego,
California 92101. On April 18, 2007, I served the within documents:

1. **NOTICE OF REMOVAL OF ACTION; DEMAND FOR JURY TRIAL [28
U.S.C. §1441(A)]**

2. **DEFENDANT'S DEMAND FOR JURY TRIAL**

3. **LODGMENT OF STATE COURT FILE**

on the interested parties in this action, by placing true copies thereof in a separate
envelope addressed to each addressee, respectively, as follows:

1

2 By transmitting via facsimile the document(s) listed above to the fax number(s) set
forth below on this date before 5:00 p.m. A copy of the transmission report issued
by the transmitting facsimile machine is attached hereto.

3

4 **(BY MAIL):** I deposited such envelope in the mail at San Diego, California. The envelope was
5 mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's
6 practice for collection and processing of correspondence for mailing with the United
7 States Postal Service; and that the correspondence shall be deposited with the United
8 States Postal Service this same day in the ordinary course of business. I am aware that
on motion of the party served, service is presumed invalid if postal cancellation date
or postage meter date is more than one day after date of deposit or mailing in affidavit.
(CCP §§ 1013, 2015.5.)

9

10 **ATTORNEYS FOR PLAINTIFF**
DIANE SWARBERG

11 **Jeffrey B. Cereghino, Esq.**
12 **Steven R. Weinmann, Esq.**
13 **BERDING & WEIL LLP**
14 **3240 Stone Valley Road West**
15 **Alamo, CA 94507**

16 **Tel: (925) 838-2090**
17 **Fax: (925) 820-5592**

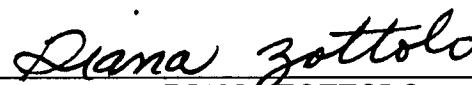
18 I am readily familiar with the firm's practice of collection and processing correspondence
19 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
20 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

21 I declare under penalty of perjury under the laws of the State of California that the above
22 is true and correct.

23 Executed on April 18, 2007, at San Diego, California.

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DIANA ZOTTOLO

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JS 44
(Rev. 07/89)

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DIANE SWARBERG

CIVIL COVER SHEET

DEFENDANTS

MENU FOODS HOLDING, INC., et al.

FILED

07 APR 18 AM 11:02
'07 CV 0706BTM PDC POR
CLARK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF SAN DIEGO
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT

(IN U.S. PLAINTIFF CASES ONLY)

NOTES IN LAND CONDEMNATION CASES, USE THE DECRIM OF THE
TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Jeffrey B. Cereghino, Esq. (99480)
Steven R. Weinmann, Esq. (190956)
BERDING & WEIL LLP
3240 Stone Valley Road West
Alamo, CA 94507

ATTORNEYS (IF KNOWN)

Susan M. Hack, Esq.
HIGGS, FLETCHER & MACK LLP
401 WEST A STREET, SUITE 2600
SAN DIEGO, CA 92101

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

PT	DEF	PT	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4. <input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

28 U.S.C. sections 1441 and 1446

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 680 Other	<input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 876 Customer Challenge 12 USC 3410	
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 881 Agricultural Acts <input type="checkbox"/> 882 Economic Stabilization Act	
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 883 Environmental Matters <input type="checkbox"/> 884 Energy Allocation Act <input type="checkbox"/> 885 Freedom of Information Act	
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 890 Appeal of Fee Determination Under Equal Access to Justice	
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 365 Other Personal Injury	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 950 Constitutionality of State Statutes	
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 380 Other Personal Injury	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 880 Other Statutory Actions	
<input type="checkbox"/> 195 Contract Product Liability	<input checked="" type="checkbox"/> 385 Property Damage Product Liability			
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 610 Motion to Vacate Sentence		
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 630 General		
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 535 Death Penalty		
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other		
<input type="checkbox"/> 246 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 550 Civil Rights		
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 555 Prison Conditions		
(PLACE AN "X" IN ONE BOX ONLY)				

VI. ORIGIN

<input type="checkbox"/> 1 Original Proceeding	<input checked="" type="checkbox"/> 2 Removal from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:
JURY DEMAND: YES NO

VIII. RELATED CASE(S) (See instructions:
IF ANY)

JUDGE

Docket Number

DATE

SIGNATURE OF ATTORNEY OF RECORD

18 APR 07

Signature

UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

137271 - 42
April 18, 2007

Code	Case #	Qty	Amount
CV086900	3-07-CV-0796		60.00 CH
Judge	MOSKOWITZ		
CV086400			100.00 CH
CV518000			190.00 CH

Total -> 350.00

FROM: CIVIL FILING
SWARBERG V. MENU FOODS HOLDING
INC ET AL.
DCN 28125 SH